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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARY ARSHANSKY, Plaintiff and Appellant, v. ANHEUSER-BUSCH EMPLOYEES CREDIT UNION, Defendant and Respondent.	B282820 (Los Angeles County Super. Ct. No. BC583942)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Mancini & Associates, Marcus A. Mancini, Michael R. Fostakowsky and Vadim Yeremenko; Benedon & Serlin, Gerald M. Serlin and Melinda W. Ebelhar for Plaintiff and Appellant.

Jackson Lewis, Thomas G. Mackey, Sherry L. Swieca and Jee Hyun Yoon for Defendant and Respondent.

Plaintiff Mary Arshansky brought the present action against her former employer, Anheuser-Busch Employees Credit Union (credit union), alleging that she was terminated because of her age and disability in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.).[1] The credit union moved for summary judgment, which the trial court granted. We conclude that plaintiff failed to present evidence from which a trier of fact could conclude that plaintiff's termination was motivated by discriminatory animus, and thus we affirm the grant of summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of our review, we accept as true the following facts and reasonable inferences supported by the parties' undisputed evidence. (*Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1125.)

A. Background

Plaintiff was born in January 1951. She was hired by the credit union as a Senior Personal Services Counselor candidate in June 1998, when she was 47 years old. Later that year, plaintiff was promoted to Senior Personal Services Counselor (senior PSC or PSC1). In that capacity, she was responsible for providing various banking services, such as cashing checks, selling money orders, opening accounts, and processing loans. Plaintiff also had managerial responsibilities, such as ordering cash for the branch, providing employee feedback, and acting as branch manager when the manager was unavailable.

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[1] All subsequent undesignated statutory references are to the Government Code.

Throughout her tenure at the credit union, plaintiff was one of four branch employees. She was supervised by manager Jill Melton, who annually evaluated plaintiff's performance in a number of categories, including "teamwork and cooperation," "member focus,"[2] "quality," "job knowledge," and "sales performance." Plaintiff was evaluated on a five-point scale: 1=unacceptable, 2=needs improvement, 3=contributor, 4=valued performer, 5=high performer.

B. Plaintiff's 2010, 2011, and 2012 Performance Reviews

In January 2010, plaintiff received an overall performance rating of 3.60. Plaintiff's highest score (4.50) was in sales performance, where Melton noted that plaintiff had taken her sales goals seriously and worked hard to achieve them. Plaintiff's scores in all other categories (teamwork, member focus, quality, and job knowledge) were "contributor" level (3.00 and 3.50). With regard to member focus, Melton noted that plaintiff's "Quality Loop" scores[3] were very good, but that plaintiff needed to "take service to the next level by offering more than what the member requested" and "tak[e] it upon [herself] to find the answers and assist the members beyond their expectations" when handling "more detailed and less common transactions."

In January 2011, plaintiff received an overall performance rating of 3.54. Plaintiff received her highest scores (4.0) in the areas of sales and self development (training), and "contributor" scores (3.50) in the areas of quality, teamwork, and member focus. She received a low score (2.50) for job knowledge; in this

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[2] The credit union refers to its customers as "members."

[3] As discussed below, the record does not reflect what a "Quality Loop" score is. (See Discussion, section III(B)(3), *post*.)

category, Melton commented: "[Y]ou are very proficient with core products and services. Assistance is still needed when helping members with . . . Bill Pay and some IRA transactions. . . . [You] [o]ften need to be reminded of updated notes or e-mails regarding new products or changes to products. Mary, your job title of PSC1 is an assistant position to the manager. Responsibilities also include looking at the branch beyond your own duties—setting the example for others, taking the initiative to suggest sales and service opportunities for both members and staff, creating folders, cheat sheets, and other tools to assist the staff with their duties. As the PSC1 you have not demonstrated organizational skills and/or the ability to lead the staff. While you do what is asked of you, I need you to be the leader for the PSC's, being their first source of information, anticipating their needs, anticipating the needs of the office, and applying solutions without my involvement."

In January 2012, plaintiff received an overall performance rating of 3.01. She received her highest score (4.0) for teamwork and cooperation, but low scores (2.5) for decision making, job knowledge, and member focus. With regard to decision making and job knowledge, Melton commented, in part: "Mary, at times you are unsure of how to proceed and ask for my input on many routine tasks. Most often the answers are in our procedures or policies. . . . [T]he duties of a Sr. PSC involve constant change, constant training, and continued learning. To be effective as a Sr. PSC it is required that you know and follow policies and procedures as well as keep up with the technology, new products, new programs, and software. Many times I have to assist you with locating new and/or changed loan policies as well as procedures. . . . I often have to remind you of the change in

policy/procedure, as well as assist you with locating that change." With regard to member focus, Melton wrote: "[Y]ou received an overall rating of 6.88 for your Quality Loop score, exceeding your goal. My personal observations show that at times your tone of voice and body language demonstrate a lack of enthusiasm. I will often prompt you to take the members' inquiries to the next level; from researching a problem that is not easily answered at the teller window, or dissecting what the real issue may be. . . . On more than one occasion I've asked you not to eat/drink while helping a member in person or on the phone. As a leader in our branch these are not behaviors that demonstrate service according to our Core Values."

C. February 2012 Action Plan

In February 2012, Melton issued plaintiff an "employee action plan," which noted that plaintiff had not improved her performance between 2010 and 2011, and identified the following "specific changes in performance that must occur:"

"● Must keep abreast of policies/procedures and [be] able to assist others with this information. [¶] . . . [¶]

"● Must show an understanding of the branch needs beyond the immediate. Such as, where are we lacking training and knowledge? Does the schedule need to be altered for any reason? Do we have enough supplies and information to successfully help members?

"● Must set the example with service to members, following our Core Values. This means willingness to help, complete follow up, professionalism, and courtesy. [¶] . . . [¶]

"● Mary needs to demonstrate her willingness to lead and guide others.

"● Must be able to manage the branch in the absence of the manager. This includes being dependable, as well as making sound decisions regarding regulations, procedures, and policies.

"● Must be able to prioritize the day, understanding what must be done and making changes as needed."

D. June 2012 Demotion

In April 2012, Melton documented an incident in which she heard a member tell plaintiff, "[I]f you're going to be this way just close my account." When Melton intervened, the member explained that she was attempting to withdraw $4,000 from her IRA, and plaintiff "acted like she didn't want to do the transaction and gave her a hard time about the cash." Melton believed the conflict was escalating, so she finished the transaction. When she spoke to plaintiff afterwards, plaintiff "acknowledged that the first thing she said [to the member] was 'did you call first' and again, I reminded [plaintiff] we need to start with what we can do and then explain that we may not always have large amounts available. . . . I also told [plaintiff] I've seen her body language that at times suggests she's not really interested in helping the member or [is] put out [by] the request." Plaintiff responded that she did not feel that way, and the member was "fine until she saw" Melton. Plaintiff believed the member was upset that she was not permitted to withdraw $4,000 in cash, not by plaintiff's treatment of her.

In June 2012, plaintiff was demoted from senior PSC to PSC. The memorandum documenting the demotion noted that plaintiff "lacked leadership qualities and quality member service skills." It stated that plaintiff's 2010 and 2011 performance evaluations had addressed those issues, for which plaintiff had received coaching and counseling, but plaintiff "continues to

perform below acceptable levels as a Sr. PSC (PSC1)." It thus recommended plaintiff's immediate demotion. However, it recommended that plaintiff be retained as a PSC, as she "has demonstrated the ability to perform the duties of a PSC; these duties include processing teller transactions, selling additional products, funding loans and opening accounts."

E. November 2012 Performance Review

Plaintiff received a six-month review in November 2012, in which she received an overall performance rating of 3.05. She received her highest score (4.0) for self development, "contributor" scores (3.0 and 3.5) for job knowledge, teamwork, productivity, and relationship building, and a low score (2.5) for member focus. Among other things, Melton commented: "[M]y observations show you are inconsistent with service and at times still appear to be too casual and disinterested in helping the member. I often prompt you to ask more questions, research further . . . ; always give alternatives—what we can do. Still reminding you not to eat or drink in front of members." Further: "Mary, you are flexible with schedule changes and willing to accommodate others. You help with additional duties when asked. Part of teamwork and cooperation is recognizing needs and acting on them without being asked. This would include processing faxed requests, branch cleanliness, decorating for promotions, tending to broken machinery, and any duties not specifically assigned to a person."

Melton documented another incident concerning plaintiff in January 2013. Melton's memorandum stated that while members were filling out a DMV form, plaintiff left her desk and went to the break room to read the newspaper. "I [Melton] asked why she left her member[s] and she said 'I'm not going to sit there while they fill out a blank form.' She had irritation in her

voice and when I told her she shouldn't leave her member[s] she raised her voice and said that's crazy. I told her it was unprofessional and to sit with her members. [¶] We talked after and Mary said they came in with a blank form—and Mary acted as if this was stupid on their part. I reminded Mary that it was a DMV form and how would they know what to complete, she then said she told them what to fill out. [¶] I again said you shouldn't leave while assisting a member and she said I didn't want to listen to them. I told her that's her job. She then said I didn't want to sit there doing nothing while they filled out the form."[4]

F. Plaintiff's February 2013 Intracranial Bleed; Medical Leave

In February 2013, plaintiff suffered an intracranial bleed while at work. Melton called the paramedics; plaintiff was hospitalized and, subsequently, underwent brain surgery. She took a leave of absence from February 11, 2013 to April 1, 2013.

On February 21, 2013, plaintiff's doctor completed a certification under the Family and Medical Leave Act (FMLA). It stated that plaintiff had been admitted to a rehabilitation center following her hospital discharge on February 18, and that she required leave due to "muscle weakness post operatively" and "on-off headache[s] requiring narcotics that alter her mind." The certification estimated that plaintiff would be incapacitated through March 20, would need to work a part-time schedule (five hours per day) through April 15, and likely would continue to experience episodic flare-ups of headaches and dizziness for several months.

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[4] Plaintiff did not specifically dispute Melton's description of this event, but said she did not recall it.

On March 26, 2013, plaintiff's doctor released her to return to work on April 1 "with no restrictions." After her return, plaintiff continued to feel tired and to experience headaches, for which she took Tylenol.

G. Plaintiff's July 1, 2013 Termination

On April 22, 2013, Melton documented that she "had observed [plaintiff] holding her head and almost lying on the teller counter while assisting a member," as well as "saying she doesn't feel well, or having a heavy sigh, that sounds as if she's tired or overwhelmed." Melton said she discussed this with plaintiff, telling her "if she isn't feeling well she needs to tell us—we can't guess how she feels." Plaintiff disagreed with this characterization, saying she had never acted in this way while assisting a member. Plaintiff conceded that she did not tell Melton that her health condition was making it difficult for her to work, but said Melton knew she was taking Tylenol and therefore must have known about her headaches.

On May 3, 2013, plaintiff's coworker, Renee Managbanag, documented several problematic interactions between plaintiff and her customers. In one interaction, a potential new member came in and asked to open an account; plaintiff responded, "Now?" and suggested the member open the account on-line. In a second interaction, a member asked questions about wiring money to another country; plaintiff said she did not know the answer to his questions and then turned to another task. Melton discussed these incidents with plaintiff and said if these kinds of issues had to be addressed again, it would be in the form of a written warning.

In her May 2013 annual review, plaintiff received an overall performance rating of 2.54. Among other things, Melton

commented: "Mary, we have discussed member service several times over the last 12 months and service has not improved. It is expected that you treat members and staff in a professional manner, greeting with a smile and eye contact, verbally speaking in a pleasant tone, and a willingness to assist. I have counseled you on smiling, eating in front of the member, responding with non-verbal communication, responding as if you're irritated with the member, and an overall lack of enthusiasm for your job. As one of our Core Values your service to members must improve." In a summary comment, Melton said: "Mary, while you can and sometimes do perform the duties of a PSC, your efforts this past year have not been at acceptable levels. We have discussed and documented your lack of interest and enthusiasm. I have counseled you on what is expected for service and duties. A 30 day final warning will be issued in the form of a development plan to document the areas you need to improve in. If improvement is not immediate and lasting, termination will occur."

As a result of her poor grade on her May 2013 performance review, plaintiff was placed on an "employee action plan" (plan) on May 31, 2013. The plan noted that since her demotion a year earlier, plaintiff "hasn't demonstrated the desire or willingness to improve her member service skills or perform the expectations of a PSC," notwithstanding coaching provided on August 29, October 19, November 30, and December 18, 2012, and on January 24, April 24, and May 3, 2013. The plan concluded: "This is a 30 day Final Warning, if immediate and lasting improvement is not demonstrated termination will occur."

At the end of the 30-day period, Melton concluded that plaintiff's performance had not improved, and thus Melton

recommended plaintiff's termination. The termination was approved by management on July 1. It is undisputed that at the time of termination, plaintiff was meeting her sales and loan goals, and that plaintiff was replaced by a woman in her mid-20's.

H. The Present Action

Plaintiff filed a complaint for damages on June 3, 2015. The complaint alleged that plaintiff was harassed and terminated because of her age and actual or perceived disability. It asserted causes of action for (1) perceived and/or physical disability discrimination, harassment, and retaliation in violation of FEHA (§§ 12940 et seq.); (2) violation of the California Family Rights Act (CFRA) (§ 12945.2); (3) perceived and/or age discrimination, harassment, and retaliation in violation of FEHA (§§ 12940, 12941); (4) retaliation and wrongful termination in violation of public policy; and (5) declaratory relief. Plaintiff sought compensatory and punitive damages, among other relief.

I. Motion for Summary Judgment

The credit union moved for summary judgment. It contended: (1) plaintiff's disability and age discrimination claims failed because plaintiff could not establish that the credit union's stated reasons for terminating plaintiff were pretextual; (2) plaintiff's harassment claims failed because plaintiff presented no evidence of harassment; (3) plaintiff's retaliation claims failed because there was no evidence that plaintiff engaged in protected activity relating to her disability or age; (4) the CFRA claim failed because the credit union employed only four people, and thus was not subject to the CFRA; and (5) for all the same reasons, plaintiff's wrongful termination and declaratory relief claims failed.

Plaintiff opposed the motion for summary judgment. She contended: (1) there was substantial evidence of pretext—namely, that she was terminated shortly after she returned from medical leave, there were discussions between plaintiff and Melton about plaintiff's retirement plans, and plaintiff's performance of objective criteria was satisfactory; (2) the credit union failed to engage with plaintiff in a good faith interactive process; (3) plaintiff was subject to a hostile work environment "through the barrage of the aforementioned discriminatory actions"; (4) plaintiff "opposed" protected activity by undergoing emergency surgery and taking a medical leave; and (5) the foregoing established wrongful termination in violation of public policy.

The trial court granted the credit union's motion for summary judgment. The court concluded that plaintiff established a prima facie case of discrimination, the credit union proffered a nondiscriminatory reason for plaintiff's termination, and plaintiff failed to demonstrate that the stated reason for termination was pretextual. Thus, plaintiff's claims for FEHA violations, retaliation, and wrongful termination failed. The court further concluded that plaintiff's CFRA claim failed because the credit union had fewer than 50 employees. Finally, the harassment and declaratory relief claims failed because there was no evidence of actionable harassment, and plaintiff failed to properly plead an independent claim for declaratory relief.

The trial court entered judgment on April 24, 2017. Plaintiff timely appealed from the judgment.

STANDARD OF REVIEW

On appeal, plaintiff challenges the grant of summary judgment only with respect to the causes of action for disability

and age discrimination. Specifically, plaintiff contends there are triable issues as to whether the credit union terminated her because of her age or disability.

In reviewing plaintiff's challenge to the grant of summary judgment, "[o]ur standard of review is well settled. Under Code of Civil Procedure section 437c, a motion for summary judgment or summary adjudication shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. On appeal from an order granting summary adjudication, we exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff's theories and establishing that the action was without merit." (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court of San Francisco* (2003) 114 Cal.App.4th 309, 320.)

DISCUSSION

I.

FEHA's Analytic Framework

FEHA prohibits an employer from, among other things, discharging a person from employment because of age, medical condition, or physical disability. (§ 12940, subd. (a).)

" 'In California, courts employ at trial the three-stage test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 . . . , to resolve discrimination claims. . . . [Citation.] At trial, the employee must first establish a prima facie case of discrimination, showing " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion. . . .' " ' " '

(*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2 (*Reid*).) A prima facie claim arises 'when the employee shows (1) at the time of the adverse action [he was a member of a protected class], (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his or her job,' (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1003 (*Hersant*)) and (4) the adverse action occurred 'under circumstances which give rise to an inference of unlawful discrimination.' (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253.) 'Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is " 'legitimate' " if it is "facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination." [Citation.] If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination.' (*Reid*, at p. 520, fn. 2, italics omitted.)

"In the context of a defense motion for summary judgment, '[a]ssuming the complaint alleges facts establishing a prima facie case that unlawful disparate treatment occurred, the initial burden rests on the employer (moving party) to produce substantial evidence (1) negating an essential element of plaintiff's case or (2) (more commonly) showing one or more legitimate, nondiscriminatory reasons for its action against the plaintiff employee. . . . [¶] . . . The burden then shifts to the plaintiff employee (opposing party) to rebut defendant's showing by producing substantial evidence that raises a rational inference

that discrimination occurred; i.e., that the employer's stated neutral legitimate reasons for its actions are each a "pretext" or cover-up for unlawful discrimination, or other action contrary to law or contractual obligation.' (Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2016) ¶¶ 19:728 to 19:729, p. 19-121, italics omitted.) By applying *McDonnell Douglas*'s shifting burdens of production in the context of a motion for summary judgment, ' "the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury." ' [Citation.]" (*Nakai v. Friendship House Assn. of American Indians, Inc.* (2017) 15 Cal.App.5th 32, 38–39 (*Nakai*).)

II.

Plaintiff Alleged a Prima Case of Discrimination

Plaintiff's complaint alleged a prima facie case of age and disability discrimination. Specifically, plaintiff alleged that she (1) was over 40 years of age and had suffered an intracranial bleed, (2) was terminated from her position at the credit union, and (3) was qualified for her position and could perform the essential duties of her job with or without reasonable accommodation.

III.

The Credit Union Produced Substantial Evidence of a Legitimate, Nondiscriminatory Reason for Terminating Plaintiff, and Plaintiff Failed to Raise a Triable Issue of Pretext

Having concluded that plaintiff alleged a prima facie case of age and disability discrimination, we turn to the second and third prongs of the *McDonnell Douglas* test: whether the credit union produced substantial evidence that it terminated plaintiff for legitimate, nondiscriminatory reasons, and whether plaintiff

presented substantial evidence that the stated reasons for termination were untrue or pretextual.

A. Legal Standards

"When an employee satisfies his or her initial burden to make a prima facie case, 'the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is " 'legitimate' " if it is "facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination." [Citation.] If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination.' (*Reid*, *supra*, 50 Cal.4th at p. 520, fn. 2, italics omitted.)" (*Nakai*, *supra*, 15 Cal.App.5th at pp. 38–39.)

" '[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' [Citation.] '[T]he employee [cannot] simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." ' " ' [Citation.]" (*Nakai*, *supra*, 15 Cal.App.5th at pp. 38–39.) In short, "[t]he 'issue is

discriminatory animus, not whether [the] employer's decision was "wrong or mistaken," or whether [the] employer is "wise, shrewd, prudent, or competent." ' [Citation.] If the employer provides a legitimate business reason for the employee's termination, the employee has the burden to provide 'substantial evidence' which could convince a ' "reasonable factfinder" ' that the ' " 'employer did not act for the [. . . asserted] non-discriminatory reasons.' " ' (*Hersant*, *supra*, 57 Cal.App.4th at p. 1005.)" (*Id.* at p. 41.)

B. Analysis

In support of its motion for summary judgment, the credit union proffered legitimate, nondiscriminatory reasons for terminating plaintiff—namely, that she failed to provide "quality member service," lacked knowledge "of credit union products and services," and, although she was given "an excessive amount of time to make improvements on the quality of her work, job performance, member service, and teamwork," she had "demonstrate[d] a lack of motivation and desire to change." Therefore, under the modified *McDonnell Douglas* test discussed above, whether summary judgment properly was granted in this case turns on whether plaintiff has adduced substantial, specific evidence that raises a rational inference of pretext sufficient to enable a reasonable trier of fact to rule in her favor.

Plaintiff does not offer any direct evidence of discrimination. That is, she does not suggest, nor is there any evidence, that anyone at the credit union ever suggested that her age or disability were factors in her termination. Instead, plaintiff urges that the credit union's proffered reasons for terminating her were pretextual. Specifically, she offers the following four reasons why she has met her burden to establish pretext: (1) Melton's testimony that she considered plaintiff

"resistant to change" is evidence of age-based bias; (2) the credit union relied on "stale" performance reviews; (3) plaintiff presented evidence of satisfactory performance reviews; and (4) plaintiff's termination was proximate in time to her medical leave. We consider each below.

(1) *Melton's Testimony as Evidence of Age-Based Bias.* Plaintiff urges that Melton's testimony that plaintiff "resisted change" is evidence of age-based bias. Plaintiff points to the following portions of Melton's deposition testimony: "She resisted change, in my opinion. . . . [W]e're constantly getting new software, new programs, new promotions, and over time, she became less willing to accept the change, almost, at times, defiant [¶] . . . [¶] . . . [I]t became more apparent that she, at times, either didn't care to learn or didn't try."

Citing *Peterson v. Mid-State Group, Inc.* (E.D. Wis. 2014) 54 F.Supp.3d 1039 (*Peterson*), plaintiff suggests that statements regarding an employee's mental flexibility or openness to change, when used in the context of older workers, can reflect evidence of age discrimination. In *Peterson*, the employer, who recently had purchased the farm-equipment dealership for whom Peterson worked, hired Peterson for a 90-day probationary period. The employer terminated Peterson after 10 days, concluding that he was incapable of learning the new computer system and was resistant to change. (*Id.* at pp. 1040—1042.) Peterson sued, alleging his termination violated the Age Discrimination in Employment Act. The district court denied the employer's motion for summary judgment, finding that the employer's reasons for terminating Peterson were "consistent with common ageist stereotypes—namely, that older workers are 'resistant to change' and are unable or unwilling to learn or adapt to new

technology." (*Id*. at p. 1044.) The court explained: "A jury could reasonably conclude that these stereotypes colored [the supervisor's] assessment of Peterson's abilities and attitude. It may be that because of these stereotypes, [the supervisor] was more likely to jump to the conclusion that Peterson would be unable to learn the new computer system and that he was resistant to the changes being made in the service department. Because of these stereotypes, [the supervisor] may have judged Peterson's performance and attitude more harshly than he would have judged the performance and attitude of a younger worker." (*Id*. at p. 1044.) The court noted that the fact that the reasons for terminating the plaintiff were "common ageist stereotypes," when coupled with the fact that the employer "terminated an experienced service manager with a record of success after only ten days under new management and replaced him with a much younger worker," would allow a jury to infer "that, but for the ageist stereotypes, [the plaintiff] would not have been terminated." (*Id*. at p. 1045.) It concluded: "If [the supervisor] had observed Peterson having substantial difficulties with the computer system after, say, a month of experience with the system, then perhaps an inference of age bias would not be reasonable. But here, the fact that Peterson was terminated after only ten days makes the inference of bias reasonable." (*Ibid*.)

We do not agree that the summary judgment record in the present case would allow a reasonable jury to infer that Melton terminated plaintiff because of age-related bias. In contrast to the supervisor in *Peterson*, Melton did not say she believed plaintiff was *unable* to learn, but rather that plaintiff "didn't care to learn" or "didn't try." Nothing in *Peterson* suggests that a

perceived unwillingness to learn—as opposed to an inability to learn—is an "ageist stereotype" that reasonably gives rise to an inference of unlawful age bias. (*Peterson*, *supra*, 54 F.Supp.3d at p. 1045.)

Further, unlike the supervisor in *Peterson*, Melton did not make a rapid decision about plaintiff's abilities. In *Peterson*, the district court concluded a jury could reasonably infer the plaintiff's termination resulted from age-based animus because the termination decision was made so quickly—the employer waited only 10 days to conclude that the plaintiff "was incapable of grasping the system and resistant to change." (*Peterson*, *supra*, 54 F.Supp.3d at p. 1045.) Thus, the court said, a jury could conclude that, because of the plaintiff's supervisor's stereotypical views, "he simply *assumed* that [the plaintiff's] initial struggles were indicative of permanent deficiencies." (*Ibid.*, italics added.) In the present case, in contrast, plaintiff's termination was preceded by more than two years of written and oral requests that plaintiff be more engaged with the customers and more familiar with the credit union's services. On this record, a jury could not reasonably infer that Melton's criticisms of plaintiff were based on stereotypes or assumptions, as opposed to observed deficiencies.

Finally, plaintiff suggests that Melton's assertions that plaintiff was unwilling to learn and resistant to change "do not mesh with Melton's own evaluation she made of [plaintiff] in every review except for the one designed to justify [plaintiff's] termination." Again, we do not agree. Plaintiff is correct that in each evaluation period, including the one immediately prior to her termination, it was noted that plaintiff met or exceeded her required training hours. Nonetheless, in both 2012 and 2013,

Melton noted that although plaintiff had completed her required training, she had not applied that training to her job. As such, we find no inconsistency between Melton's earlier and subsequent evaluations.

(2) ***The Credit Union's Reliance on "Stale" Performance Evaluations.*** Plaintiff contends that the credit union relied on "stale" performance evaluations to justify plaintiff's demotion and eventual termination, thus giving rise to an inference of pretext. We do not agree. It is true that the credit union sought to demonstrate that plaintiff's termination was not motivated by unlawful bias by introducing copies of plaintiff's 2010, 2011, and 2012 performance appraisals. The credit union cited those appraisals as evidence that it had made "exhaustive unsuccessful efforts to counsel [plaintiff] to improve her performance." Contrary to plaintiff's assertion, however, the credit union did not "rely" on these performance appraisals to justify plaintiff's termination, but rather pointed to them as evidence that the deficits for which plaintiff was terminated were not new ones.

Plaintiff also suggests that her performance appraisals establish unlawful discrimination because they demonstrate that "[f]or more than a decade, until after Arshansky turned 60 years old, her purported deficiencies were never sufficient to cause the Credit Union to change her status." In fact, the credit union relied on just three years of records (2010—2013). These records document that plaintiff's demotion followed a two-year period during which Melton expressed criticism of plaintiff's performance, and that her termination followed an additional one-year period during which plaintiff was told that her

performance had not improved. A reasonable jury could not conclude to the contrary.

(3) ***The Credit Union's Reliance on Subjective Performance Factors.*** Plaintiff contends that, based on the increasing disparity between the objective and subjective measures of plaintiff's performance after plaintiff turned 60 in 2011, a reasonable jury could conclude that the credit union's stated reasons for termination were pretextual. According to plaintiff, although the "objective" measures of her performance remained high, Melton's "subjective" evaluation of plaintiff's performance decreased between 2011 and 2013. From this evidence, plaintiff urges, a jury could conclude that her allegedly "poor service" was a pretext for unlawful termination based on age and disability.

As a preliminary matter, we question the accuracy of plaintiff's assertion that there was a disparity between the credit union's "objective" and "subjective" evaluations of her performance. Plaintiff describes her "Quality Loop" scores as an "objective" measure of her performance, but as the credit union notes, there is no discussion anywhere in the record of what a "Quality Loop" is.[5] We therefore cannot conclude that the "Quality Loop" was an objective measure of plaintiff's customer service—or, indeed, of anything else. Based on this record, there is no evidence from which a jury reasonably could infer unlawful bias from an asserted discrepancy between plaintiff's "Quality Loop" and overall performance ratings.

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[5] Plaintiff cites to two portions of Melton's deposition testimony for the proposition that the "Quality Loop" score was an objective measure of customer service; neither supports it.

Plaintiff also asserts that a reasonable jury could "easily question the sudden decline in Melton's subjective grading of Arshansky's performance after Arshansky turned 60 and again after Arshansky returned from medical leave." Again, we do not agree. The summary judgment record does not evidence a "sudden decline" in Melton's evaluations of plaintiff's performance after her 60th birthday. To the contrary, as plaintiff's own evidence demonstrates, in the four years that preceded plaintiff's 60th birthday, plaintiff received overall ratings of 3.63 (2007), 3.25 (2008), 3.69 (2009), and 3.60 (2010); immediately following her 60th birthday, plaintiff received an overall rating of 3.54 (2011). These numbers do not suggest a "sudden decline."

More significantly for our purposes, Melton began documenting concerns about plaintiff's job knowledge and member focus as early as 2010—more than three years before plaintiff was terminated, and well before she either turned 60 or suffered her intracranial bleed. While Melton's post-2010 reviews of plaintiff's performance reflect a belief that plaintiff's performance was deteriorating in these areas, no reasonable finder of fact could conclude that the concerns were new ones. (See *Hodgens v. General Dynamics Corp.* (1st Cir. 1998) 144 F.3d 151, 172 ["[n]o rational factfinder could reasonably conclude" that employer terminated employee for exercising his rights under the FMLA, where overwhelming evidence demonstrated employee's poor performance during two full years prior to his protected medical leave]; compare *Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1130—1131, 1136—1137, 1140, fn. 3 [evidence that employee's supervisor commented negatively on employee's request for extended FMLA leave, coupled with lowest possible

scores for several "soft skills" ("being upbeat" and understanding "what motivates team members"), gave rise to triable issue concerning whether supervisor took employee's leave request into account in giving her a low score on her evaluation and recommending her for termination].)

(4) ***"Proximity in Time" Evidence.*** Plaintiff asserts finally that a trier of fact could reasonably infer discriminatory bias based on the temporal proximity between plaintiff's 60th birthday (January 2011) and intracranial bleed (February 2013), on the one hand, and plaintiff's termination (July 2013), on the other.

It is true, as Arshansky asserts, that in some cases a discriminatory motive may be proved by evidence " 'that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615.) However, "temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353 (*Arteaga*).) This is especially so "where the employer raised questions about the employee's performance *before* he disclosed his symptoms, and the subsequent termination was based on those performance issues." (*Ibid.*)

The court applied this analysis to find no substantial evidence of pretext in *Arteaga*, *supra*, 163 Cal.App.4th 327. There, the plaintiff, a Brink's messenger, was told by his employer that he was under investigation for cash shortages. Shortly thereafter, the plaintiff reported that he was

experiencing pain and numbness in his arms and fingers, and he completed an employee personal injury statement. Approximately a week later, Brink's terminated the plaintiff, informing him that the company had lost confidence in him as a result of several ATM shortages. (*Id*. at pp. 335—339.)

Plaintiff sued Brink's for disability discrimination. The trial court granted summary judgment for Brink's, and the Court of Appeal affirmed. (*Arteaga*, *supra*, 163 Cal.App.4th at pp. 334—335.) It noted that although temporal proximity between an employee's disclosure of symptoms and a subsequent termination may be *a* factor in establishing pretext, it cannot be the *only* factor. Were the law otherwise, the court said, "[a]n employee, fearing that his job is on the line, [could] raise an old wound as a preemptive strike to escape appropriate discipline or discharge." (*Id*. at p. 354.) In the present case, "*Before* Arteaga disclosed his symptoms, his performance had long been the subject of criticism, he had been suspended on one occasion, and he knew Brink's was already investigating a shortage on one of his runs. *After* the disclosure, no one made any negative remarks about his condition." (*Id*. at p. 354.) Accordingly, the court said, temporal proximity "does not support a finding of pretext here." (*Id*. at p. 353.)

The present case is analogous. Although we do not suggest that Arshansky feigned her illness—she emphatically did not—it is undisputed that plaintiff's performance was the subject of criticism long before she suffered an intracranial bleed. Indeed, the record is clear that more than six months before plaintiff's bleed, she was demoted for some of the very same performance problems that ultimately led to her termination. While plaintiff's health condition could not lawfully be the reason for plaintiff's

termination, neither could it guarantee plaintiff permanent employment by the credit union.

For all of these reasons, plaintiff failed to raise a triable issue that the credit union's reasons for termination were pretextual. Therefore, the trial court correctly granted the credit union's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Defendant is awarded its appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.